

MOTION FILED  
AUG 7 1978

No. 77-753, 754

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND  
HELPERS OF AMERICA,

v. *Petitioner,*

JOHN DANIEL,

*Respondent.*

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA, and LOUIS F. PEICK,

v. *Petitioners,*

JOHN DANIEL,

*Respondent.*

On Writs of Certiorari to the United States Court of Appeals  
for the Seventh Circuit

**MOTION OF PROD, WOMEN'S LOBBY, INC. AND  
THE INSTITUTE FOR PUBLIC INTEREST  
REPRESENTATION FOR LEAVE TO FILE A BRIEF  
AS AMICI CURIAE, AND BRIEF, IN SUPPORT  
OF RESPONDENT**

MICHAEL J. GOLDBERG  
ARDITI, SALAZAR & GOLDBERG  
1812 East Madison Street  
Seattle, Washington 98122

ARTHUR L. FOX II  
2000 P Street, N.W.  
Washington, D.C. 20036

*Of Counsel:*

DOUGLAS L. PARKER  
600 New Jersey Ave., N.W.  
Washington, D.C. 20001

*Attorneys for Amici Curiae PROD,  
Women's Lobby, Inc. and the  
Institute for Public Interest  
Representation*

## TABLE OF CONTENTS

	Page
Motion .....	1
Brief .....	7
INTEREST OF THE <i>AMICI CURIAE</i> .....	8
SUMMARY OF ARGUMENT .....	8
ARGUMENT .....	10
Introduction .....	10
I. Disclosure Of The Risks Inherent In Pension Plan Investments Is Necessary To Enable Em- ployees To Act Intelligently To Protect Their Interests In A Secure Retirement .....	12
A. An Employee's Interest In A Pension Plan Is An Investment Of Great Value .....	12
B. Employees Need Disclosure of the Risks In- herent in Pension Plans In Order To Make Informed Investment Decisions .....	16
C. Employees Make Investment Decisions When They Accept Offers of Employment and Rati- fy Collective Bargaining Agreements .....	18
II. Disclosure Under The Securities Laws Is Prac- tical, Meaningful, And Not Unduly Burden- some .....	21
III. Disclosure Under The Securities Laws Does Not Duplicate Disclosure Under ERISA And Is Con- sistent With That Statute's Language And Leg- islative History .....	24
A. Even Under ERISA, Pensions Remain High Risk Investments .....	24
B. Disclosure Under The Securities Laws Does Not Duplicate Disclosure Under ERISA .....	25
C. Application Of The Antifraud Provisions Of The Securities Laws To Pension Plans Is Consistent With The Language and Legisla- tive History Of ERISA .....	28

## II

## TABLE OF CONTENTS—Continued

	Page
IV. The Decision Below Does Not Conflict With National Labor Policy And Does Not Threaten Interference With Collective Bargaining .....	33
V. Petitioners' Predictions Of Catastrophic Liability Are Totally Unfounded .....	37
CONCLUSION .....	41

## III

## TABLE OF AUTHORITIES

Cases	Page
<i>Alabama Power Co. v. Davis</i> , 431 U.S. 581 (1977) ..	14
<i>Blue Chip Stamps v. Manor Drug Stores</i> , 421 U.S. 723 (1975) .....	11
<i>Daniel v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America</i> , 561 F.2d 1223 (7th Cir. 1977) .....	10, 21
<i>England v. Louisiana State Board of Medical Examiners</i> , 375 U.S. 411 (1964) .....	40
<i>Ernst &amp; Ernst v. Hochfelder</i> , 425 U.S. 185 (1976) ..	34, 38
<i>Inland Steel Co. v. NLRB</i> , 170 F.2d 247 (7th Cir. 1948), <i>cert. denied</i> , 336 U.S. 960 (1949) .....	14
<i>Jones v. Alfred H. Meyer Co.</i> , 392 U.S. 409 (1968) ..	32
<i>Los Angeles Dep't of Water &amp; Power v. Manhart</i> , — U.S. —, 98 S.Ct. 1370 (1978) .....	39
<i>NLRB v. Movie Star, Inc.</i> , 361 F.2d 346 (5th Cir. 1966) .....	34
<i>Simpson v. Union Oil Co. of California</i> , 396 U.S. 13, 14 (1969) .....	40
<i>Stokely-Van Camp Inc.</i> , 186 NLRB No. 64, 76 LRRM 1166 (1970) .....	34
<i>Stovall v. Denno</i> , 388 U.S. 293, 301 (1967) .....	40
<i>Train v. Colorado Public Interest Research Group</i> , 426 U.S. 1 (1976) .....	29
<i>United States v. American Trucking Assoc.</i> , 310 U.S. 534 (1940) .....	29
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967) .....	36
Statutes and Rules	
Civil Rights Act of 1866	
42 U.S.C. § 1982 .....	32
Civil Rights Act of 1968	
42 U.S.C. §§ 3601 <i>et seq.</i> .....	32
Employee Retirement Income Security Act of 1974, 88 Stat. 829 .....	<i>passim</i>
§ 104(b) (1) .....	26, 27

## TABLE OF AUTHORITIES—Continued

	Page
§ 104(b) (1) (B) .....	26
§ 202(a) .....	26
§ 302 .....	39
§ 303 .....	39
§ 514 .....	29
§ 514(d) .....	29
§ 4022 .....	25
Welfare and Pension Plans Disclosure Act of 1958	
29 U.S.C. § 301 <i>et seq.</i> .....	30
Other Authorities	
Address by Sen. Jacob K. Javits, Briefing Conference on Pensions and Employee Benefits (Sept. 19, 1974) .....	14
Bernstein, <i>The Future of Private Pensions</i> (1964) ..	14
186 B.P.R. A-21, 22 (May 1, 1978) .....	18
Clark, <i>The Role of Private Pensions in Maintaining Living Standards in Retirement</i> , National Planning Association (1977) .....	12, 14
Clarity, <i>Miners Reject 'Pattern-Setter' Pact By 2-1 Margin</i> , New York Times, Feb. 27, 1978, at 17, col. 2 .....	19
Dep't. of National Health and Welfare, <i>Income Security for Canadians</i> (1970) .....	14
Dep't. of Labor, Bureau of Labor Statistics, <i>Coverage and Vesting of Full Time Employees Under Private Retirement Plans, From April 1972 Survey</i> (Sept. 1973) .....	10
Dep't. of Labor, <i>Employee Compensation in the Private Nonfarm Economy, 1974</i> , Bureau of Labor Statistics Bull. 1963 (1977) .....	12
Dep't. of Treasury, Dep't. of Labor, <i>Study of Pension Plan Terminations, 1972, Final Report</i> (Aug. 1973) .....	25
Franklin, <i>Miners Reject Pact Proposed By Leader As Disruption Grows</i> , New York Times, Feb. 13, 1978, at 1, col. 1 .....	19

## TABLE OF AUTHORITIES—Continued

	Page
Franklin, <i>A 3d Coal Pact Set; 'Yes' Vote Expected</i> , New York Times, March 15, 1978, at 1, col. 1....	19
Greenough, W. & F. King, <i>Pension Plans and Public Policy</i> (1976) .....	13
Group Annuity Tables, 1971 .....	25
Grubbs, D., <i>Report to the Secretary of Labor: Potential Effects of Daniel</i> , March 20, 1978 .....	38
H.R. Rep. No. 95-35, 95th Cong., 1st Sess. (1978) ..	20
<i>Hearings Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare on S. 3598</i> , 92d Cong., 2d Sess. (1972) .....	30
International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Constitution (June 1976) .....	34, 35
Kramer, <i>Fight on Over Protecting Pension Fund Investors</i> , Washington Post, May 25, 1978, at D-12 .....	31
La Velle, <i>Teamsters to Vote On a Gag Rule</i> , Chicago Tribune, May 18, 1978 .....	35
Legislative History of the Employee Retirement Income Security Act of 1974 (G.P.O. 1976) .....	32
Levin, N., <i>Labor-Management Employee Benefit Plans</i> (1971) .....	16
<i>Like Old Man River, Central States Pension Just Keeps Rolling Along</i> , The International Teamster, Oct.-Nov. 1976 .....	20
McGill, D., <i>Fulfilling Pension Expectations</i> (1962) .....	19
McGill, D., <i>Fundamentals of Private Pensions</i> (1975) .....	16
<i>Message From Frank E. Fitzsimmons</i> , The International Teamster, Feb. 1978 .....	20
<i>Pensions and Investments</i> , April 11, 1978 .....	13
Mishkin, <i>The Supreme Court 1964 Term—Forward: The High Court, the Great Writ, and the Due Process of Time and Law</i> , 79 Harv. L. Rev. 56 (1965) .....	41

## TABLE OF AUTHORITIES—Continued

	Page
Nader and Blackwell, <i>You and Your Pension</i> (1973) .....	28
Pozen, <i>The Prudent Person and ERISA: A Legal Perspective</i> , Financial Analysts Journal (March-April, 1977) .....	17
Rifkin, J., & R. Barber, <i>The North Will Rise Again: Pensions, Politics and Power in the 1980's</i> (1978) .....	10
Robbins, <i>West Virginia Miners Criticize Pension Plan In Proposed Contract</i> , New York Times, Feb. 26, 1978, at 1, col. 4 .....	19
Securities & Exchange Comm'n, Statistical Bull. (May, 1978) .....	13
S. Rep. No. 92-634, 92d Cong., 2d Sess. (1972) .....	22, 30
Shabecoff, <i>Life in a Rose-Covered Cottage Isn't Rosy on \$2,485 A Year</i> , New York Times, June 25, 1978 .....	18
Simkin, <i>Union Membership Rejection of Contract Settlements</i> , Labor Relations Yearbook 334 (1967) .....	19
Skolnick, <i>Private Pension Plans, 1950-74</i> , Soc. Sec. Bull., June, 1976 .....	10
Summers, <i>The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?</i> , 126 U. Pa. L. Rev. 251 (1977) .....	36
Ture, N., <i>The Future of Private Pension Plans</i> (1976) .....	12

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

---

No. 77-753

---

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
 CHAUFFEURS, WAREHOUSEMEN AND  
 HELPERS OF AMERICA,

v. *Petitioner,*

JOHN DANIEL,  


---

*Respondent.*

No. 77-754

---

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
 CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
 OF AMERICA, and LOUIS F. PEICK,

v. *Petitioners,*

JOHN DANIEL,  


---

*Respondent.*

On Writs of Certiorari to the United States Court of Appeals  
 for the Seventh Circuit

---

MOTION OF PROD, WOMEN'S LOBBY, INC. AND  
 THE INSTITUTE FOR PUBLIC INTEREST  
 REPRESENTATION FOR LEAVE TO FILE BRIEF  
 AS AMICI CURIAE

---

PROD, Women's Lobby, Inc. and the Institute for Public Interest Representation respectfully move this Court, pursuant to Supreme Court Rule 42(3), for leave to file the accompanying brief as *amici curiae* in support of the Respondent in this case. To identify the interests of the applicants and support this motion PROD, Women's Lobby and the Institute for Public Interest Representation state:

1. This motion is necessary because Petitioners have refused to consent to the filing of an *amici curiae* brief by PROD, Women's Lobby and the Institute for Public Interest Representation.

2. PROD is a nationwide rank-and-file Teamster reform organization. Also known as the Professional Drivers Council, PROD is a non-profit corporation supported by the voluntary dues of approximately 5,500 rank-and-file Teamsters. Among PROD's members are Chicago area Teamsters, including some affiliated with Local 705.

3. Chief among PROD's goals is to reform and democratize the Teamsters Union and to make the union's officials responsive and accountable to its membership. A major obstacle to such reform has been the cloak of secrecy behind which many Teamster officials have conducted their business both as union officers and as pension fund trustees. Administration of Teamster pension plans is one area where this problem has had devastating effects. John Daniel is only one of thousands of Teamsters who have been denied the opportunity to make informed and intelligent decisions about whether to become or remain participants in Teamster pension plans, and whether to ratify proposed collective bargaining agreements defining the terms of their pension plans. The type of disclosure called for by the court below is essential if individual Teamsters are to be able to make informed investment decisions for a secure retirement, and if the Teamsters membership as a whole is ever to root out the

corruption and mismanagement which has characterized Teamster pension plans for far too long.

4. Women's Lobby, Inc. is a non-profit corporation which ensures that the interests of women are heard when Congress considers legislation affecting women. As a women's rights organization, Women's Lobby has a longstanding interest in pension issues as is evidenced by its efforts supporting enactment of ERISA in 1974. Women now comprise 40.3 percent of the labor force, and many of these women are working in jobs covered by pension plans that may be affected by this case. These women, particularly those who take time away from work to raise children, need to be aware that, contrary to their expectations, pension plans do not work like social security and that many plans specifically depend upon forfeitures by women. They need this information before they begin to work so that they may plan their working careers.

Women not working outside the home tend to assume that they will automatically be the beneficiaries of their husbands' pension plans. Their husbands typically share this assumption and do not make adequate provision for alternative sources of income for their wives. When these women are widowed, they do not have the benefits they were counting on. Women have a particularly strong interest in making, and helping their spouses to make, informed pension investment decisions.

5. The Institute for Public Interest Representation ("the Institute") is a public interest law firm affiliated with the Georgetown University Law Center. For the past three years, the Institute has been active in the field of pension reform and has participated frequently in the development of regulations under the Employee Retirement Income Security Act of 1974 ("ERISA"), representing the interests of pension plan participants and beneficiaries. It has sought to assure that when federal

agencies charged with the execution of laws relating to pensions respond to such highly organized constituencies as labor unions and employers' associations, agency actions are not taken at the expense of employees' rights under ERISA. The Institute participated in the proceeding below in *Daniel* as an *amicus* before the court of appeals.

6. *Amicus curiae* briefs have already been filed with this Court in support of the position of the petitioners by the National Coordinating Committee for Multiemployer Plans ("NCCMP") and the ERISA Industry Committee ("ERIC"), among others. The NCCMP represents 50 trade unions and collectively bargained multi-employer pension plans and thus provides the Court with organized labor's perspective on this case. Similarly, ERIC represents 83 major United States corporations maintaining hundreds of pension plans in a wide cross-section of American industries and thus provides the Court with the perspective of employers on pension plan issues. The interests represented by the NCCMP and ERIC in this litigation are diametrically opposed to the interests of most of the 30 million employees covered by private pension plans.

7. PROD, the Women's Lobby and the Institute are concerned that absent their participation, the interests of present and prospective employees may not be fully represented before this Court. The interests of the petitioners, NCCMP, and ERIC are fundamentally inconsistent with those of plan participants. The respondent and *amicus* Gray Panthers are necessarily concerned primarily with the impact of the lower court's decision on retired workers such as themselves, not with the millions of current and future employees who stand to benefit from the Court's decision.

WHEREFORE, PROD, Women's Lobby and the Institute move for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

MICHAEL J. GOLDBERG  
ARDITI, SALAZAR & GOLDBERG  
1812 East Madison Street  
Seattle, Washington 98122

ARTHUR L. FOX II  
2000 P Street, N.W.  
Washington, D.C. 20036

*Of Counsel:*

DOUGLAS L. PARKER  
600 New Jersey Ave., N.W.  
Washington, D.C. 20001

*Attorneys for Amici Curiae PROD,  
Women's Lobby, Inc. and the  
Institute for Public Interest  
Representation*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

---

No. 77-753

---

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND  
HELPERS OF AMERICA,

v. *Petitioner,*

JOHN DANIEL,

*Respondent.*

---

No. 77-754

---

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA, and LOUIS F. PEICK,

v. *Petitioners,*

JOHN DANIEL,

*Respondent.*

On Writs of Certiorari to the United States Court of Appeals  
for the Seventh Circuit

---

BRIEF OF PROD, WOMEN'S LOBBY, INC. AND  
THE INSTITUTE FOR PUBLIC INTEREST  
REPRESENTATION AS *AMICI CURIAE* IN SUPPORT  
OF RESPONDENT

---

### INTEREST OF THE *AMICI CURIAE*

As stated in the accompanying motion for leave to file this *amici curiae* brief, PROD is a nationwide rank-and-file Teamster reform organization, Women's Lobby is a women's rights organization particularly concerned with federal legislation affecting the interests of women, and the Institute for Public Interest Representation ("the Institute") is a public interest law firm which has been concerned with protecting the rights of pension plan participants and beneficiaries. These organizations have a longstanding interest in pension reform and they are representing the interests of present and future pension plan participants who stand to benefit if the decision of the court below is affirmed.

### SUMMARY OF ARGUMENT

This brief will not directly address the detailed statutory argument supporting Mr. Daniel's claim that his interest in the Local 705 Pension Fund is an interest in a security. Rather, we will show that application of the antifraud provisions of the securities acts is necessary to protect the very substantial interests of millions of pension plan participants and beneficiaries. A pension is often the largest single investment a worker makes and the value of that investment can mean the difference between a secure and dignified retirement and a poverty level subsistence. For this reason, workers must be able to make informed employment and contract ratification decisions which can have a substantial effect upon their financial security during retirement.

The brief will also demonstrate that application of the securities laws in order to protect these interests of workers is completely feasible and need not be unduly burdensome for pension funds, and that it will not impose excessive liability upon unions or employers despite their dire predictions of totally speculative consequences. No court

has yet determined exactly what information would have to be disclosed, and it would be premature for this court to do so without a fully developed factual record. However, as this brief explains, there is no reason why the special nature of pension investments and employment relationships cannot be considered and accommodated so that the disclosure requirements would not be burdensome. Nor is there any reason why affirmance of the decision below will have the disastrous economic impact predicted by the unions and employers.

Finally, *amici* will explain how the application of the securities laws will complement, rather than conflict with, ERISA and national labor policy. ERISA was recognized by Congress to be only a partial solution to pension problems and was never intended to deny the protections of the securities laws to pension plan participants. ERISA was designed primarily to protect the interests of individuals only after they become participants in pension plans. The securities laws, on the other hand, were designed to protect the interests of individuals at the critical moment when they decide whether or not to make a particular investment. For that reason, the timing and content of the disclosure required by the two laws differ, and serve complementary, rather than overlapping or conflicting purposes. Similarly, arguments that application of the securities laws to collectively bargained pension plans conflicts with national labor policy are unfounded, since the decision below in no way undermines a union's exclusive authority to bargain on behalf of its members. It simply provides a remedy to workers whose unions intentionally mislead them about the pension plans they have negotiated, when the unions choose to submit those plans to them for their approval. The Court should therefore affirm the decision below and permit Mr. Daniel to have his day in court and attempt to prove that petitioners committed an intentional fraud which resulted in his loss of a pension.

## ARGUMENT

### Introduction

The court below held that an employee induced by an intentional misrepresentation or omission of material fact to accept participation in a pension plan has a remedy under the antifraud provisions of the Securities Acts of 1933 and 1934. The Seventh Circuit's opinion suggests that when an employer or, as in the present case, a union, offers a defined benefit pension plan to a prospective employee or member, the employer or union must disclose both the fact that there is a risk the employee or member will not receive the pension benefits, and the factors, such as breaks in service, death before retirement age, and plan termination, that can cause the employee or member to be deprived of his or her benefits.<sup>1</sup> The practical effect of the circuit court's opinion, if it is affirmed, will be that employers and unions will no longer be able to conceal from employees and prospective employees the fact that there is a substantial risk that many employees investing in pension plans will never receive their pension benefits.

Both unions and employers have a vested interest in withholding from employees information about the risk that they will not receive their benefits, however. Although employers contribute approximately \$23 billion annually to private pension plans on behalf of roughly 30 million employees,<sup>2</sup> perhaps only as few as one-third to one-half of those employees will receive pension benefits as a result of these contributions.<sup>3</sup> By concealing these

<sup>1</sup> *Daniel v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 561 F.2d 1223, 1228-29 (7th Cir. 1977).

<sup>2</sup> Skolnick, *Private Pension Plans, 1950-74*, 39 Soc. Sec. Bull. 3, 4 (June 1976).

<sup>3</sup> "Over one-half of the work force covered by pension funds changes jobs well before the ten-year vesting standard imposed by ERISA. Because there is no legal mechanism by which workers

facts from employees, employers can mislead millions of workers into believing they are receiving compensation for their labor in the form of pension coverage they will never receive. Since defined benefit plans use the forfeited pension benefits of shorter service employees to subsidize the pensions of longer service employees, employers use these plans to induce employees to remain in service longer and to thereby create an experienced workforce with less turnover, at minimal expense to themselves. Similarly, concealing the risks of these pension plans from their members enables union leaders to mislead their membership into believing the union has obtained for them a much larger wage and benefit package than is actually the case.

Unfortunately, the interest of unions and employers in opposing the type of disclosure proposed by the court below is not revealed in the *amicus curiae* briefs of the National Coordinating Committee for Multiemployer Plans ("NCCMP"), representing organized labor, or of the ERISA Industry Committee ("ERIC"), representing employers. Rather, the NCCMP and ERIC briefs and other briefs seeking reversal attempt to use this Court's consideration of "policy considerations" in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), as an excuse to raise numerous arguments that are, as explained below, simply misleading and are intended to divert the Court's attention from the genuine issues in the case.

can transfer their accumulated employment time to other jobs, they lose all the deferred wages that have been set aside for them." J. Rifkin & R. Barber, *The North Will Rise Again: Pensions, Politics and Power in the 1980's* at 127 (1978) citing Bureau of Labor Statistics, *Coverage and Vesting of Full Time Employees under Private Retirement Plans, from the April 1972 Survey* (Sept. 1973) (hereinafter cited as Rifkin & Barber).

**I. DISCLOSURE OF THE RISKS INHERENT IN PENSION PLAN INVESTMENTS IS NECESSARY TO ENABLE EMPLOYEES TO ACT INTELLIGENTLY TO PROTECT THEIR INTERESTS IN A SECURE RETIREMENT**

**A. An Employee's Interest In A Pension Plan Is An Investment of Great Value**

The importance of pension funds to individual participants and beneficiaries can hardly be overstated. As a recent National Planning Association study noted, "it is only those retirees receiving pension benefits who are able to continue preretirement consumption levels during the retirement period." R. Clark, *The Role of Private Pensions in Maintaining Living Standards in Retirement* 23 (1977).

Pension plans are also of critical importance to individuals because of the substantial monetary investment they represent. More than four percent of a typical union member's total compensation goes into his or her pension fund. *Employee Compensation in the Private Nonfarm Economy, 1974*, Dep't. of Labor Bureau of Labor Statistics Bull. 1963(1975). An individual's pension fund investment is often the largest single investment of his or her lifetime. It is also likely to be the individual's only opportunity to participate in the capital markets system.

Because of "favorable tax provisions, . . . information, transaction and management economies and the greater capacity for portfolio diversification, pension funds represent the most efficient way for the average worker to invest in the securities market." N. Ture, *The Future of Private Pension Plans* 3 (1976). Pension funds are also the largest and fastest growing source of private investment capital. Private pension funds now have \$279.6

billion in assets.<sup>4</sup> Together with public pension funds it is estimated that they own 25 percent of the equity in the nation's largest corporations.<sup>5</sup>

Respondents and their *amici* go to great lengths to argue that an individual's interest in an involuntary non-contributory defined benefit plan is distinguishable from other investments in the capital markets on the ground that the individual's investment is tied to his or her employment, is based on contributions made by an employer and results in a return based on forfeitures rather than on market risk.

What the Respondents and their *amici* fail to note is that all of these factors are the result of certain public policy, historical and practical considerations which do not affect the essential nature of the individual's investment. For example, the fact that an individual's investment in the capital markets is channeled through a pension fund tied to employment, rather than being invested directly by an individual in a mutual fund or similar voluntary savings vehicle is merely the result of public policy which recognizes that ever-increasing de-

<sup>4</sup> Securities and Exchange Comm'n, *Statistical Bulletin* 6 (May, 1978). All pension plans, public and private, have a book value of over \$500 billion. *Id.* at 8. As two commentators have pointed out:

"That is more money than was spent on food, clothing, and shelter by all 215 million Americans last year. Pension funds are now larger than the combined GNP of the United Kingdom and France. . . . For a nation used to thinking of wealth in terms of private savings, it would probably shock most Americans to know that pension funds are now four times larger than the amount of all individual savings in the United States. . . ." Rifkin & Barber, *supra* at 84.

<sup>5</sup> *Pensions and Investments*, April 11, 1978. The value of stocks accumulated by private noninsured pension funds in the past twenty years exceeds the total accumulated during that period by the three other major institutional groups of investors—mutual funds, life insurance companies, and property and liability insurance companies. W. Greenough & F. King, *Pension Plans and Public Policy* 140 (1976).

mands on limited current income make forced savings the only effective means of providing an adequate income at retirement. Clark, *supra* at 11.

Similarly, the fact that pension fund contributions are typically made by employers, rather than employees, is the product of (a) tax laws which tax employee contributions to pension plans but not employer contributions, and (b) pressure by organized labor on employers to make contributions directly. M. Bernstein, *The Future of Private Pensions*, 19 (1964)<sup>6</sup>. The result is little different than if the employer compensated the employee with cash which the employee then invested in a pension plan.<sup>7</sup>

<sup>6</sup> Canada which has a pension system virtually identical to the U.S. system operates under a contributory arrangement. Department of National Health and Welfare, *Income Security for Canadians* 2-3 (1970). Senators Harrison A. Williams, Jr. and Jacob K. Javits introduced the "ERISA Improvements Act of 1978" (S. 3017) on May 1, 1978 which would, among other things, encourage contributory arrangements in this country.

<sup>7</sup> It can no longer be seriously contended that employees do not give "value" for pensions. It has been well-settled since *Inland Steel Co. v. NLRB*, 170 F.2d 247, 253 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), that in the case of collectively bargained plans, an employee's promised pension is "as much a part of his 'wages' as the money paid him at the time of the rendition of his services." Recognition that pensions are deferred wages rather than gratuities in the case of non-negotiated plans was somewhat slower in coming, but the issue was definitively resolved by the passage of ERISA. According to Senator Jacob K. Javits, co-sponsor of the legislation:

"... I believe that [ERISA] has settled in an indisputable fashion, the legal status of private pensions. Whatever lingering doubts may have persisted prior to its passage, the law tells us that private pensions are a form of deferred wages and not a form of gratuity to be offered and withdrawn at the whim of the employer. In short the 'gold watch' theory of pensions is dead for once and for all."

Address by Senator Jacob K. Javits, Briefing Conference on Pensions and Employee Benefits, September 19, 1974.

This Court's recent decision in *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977), does not require a different conclusion. When the

Finally, the fact that a pension plan operates on a "defined benefit" rather than "defined contribution" basis does not alter the fact that it represents an individual's very substantial investment in the capital markets. The "defined benefit" aspect of a pension plan is nothing more than a technique for achieving certain objectives over and above the basic investment return on which both defined benefit and defined contribution plans depend.<sup>8</sup>

Court there stated that "the 'true nature' of the pension payment is a reward for length of service," *id.* at 593, it was addressing a different question from the one now before the Court. In this case, the Court is asked to identify the value an employee gives when he or she makes the decision to invest in a pension plan by accepting a job covered by a plan or by ratifying a collective bargaining agreement defining the terms of a plan. The answer is not just that the employee gives the promise of long service in jobs covered by the plan, but also that he or she forgoes current compensation which would have been earned in the absence of a pension plan. The Court acknowledged this fact in *Alabama Power* when it noted that "future benefits may be traded off against current compensation." *Id.* at 592-93. The question before the Court in *Alabama Power* was entirely different. There, the Court had to determine which of these two components of the value given defined its overall character within the narrow context of the Military Selective Service Act. By concluding that "pension payments are *predominantly* rewards for continuous employment with the same employer," *id.* at 594 (emphasis added), the Court was by no means deciding that present compensation forgone was not also an important part of that value. Unlike the selective service laws, nothing in the securities laws requires that all the value given for a security be characterized as value of a single type. Petitioner in this case does not have to show that the value he gave when he invested in the Local 705 pension plan was exclusively or even predominantly present compensation forgone, but only that it was such at least in part. As the Court itself suggested in *Alabama Power*, classifications of pensions as wages or as rewards for long service for purposes of one statute do not necessarily control such classifications for purposes of others. *Id.* at 593 n.17.

<sup>8</sup> Defined benefit plans differ from defined contribution plans only in the fact that defined benefit plans have certain "advantages". These advantages include the ability of defined benefit plans to provide pension credit for years worked before plans come into effect and the fact that the plans can relate benefit levels to final, or

In short, as mechanisms for employee investment in the capital markets, there are fundamentally no differences between involuntary, noncontributory defined benefit pension plans and voluntary contributory defined contribution plans or other similar investment vehicles.

#### **B. Employees Need Disclosure Of The Risks Inherent In Pension Plans In Order To Make Informed Investment Decisions**

To make an informed investment decision a person considering an investment in a pension plan needs to be told not merely the profit he or she can expect to receive but also the risk of loss. This risk includes both the risks arising out of a fund's participation in the capital markets and the risks that may preclude the investor from benefiting from the fund's participation in the capital markets.

---

career average pay. D. McGill, *The Fundamentals of Private Pensions*, 94-96 (1975). These "advantages" result in costs too great to be funded by the pension plan's investment return. Instead, they are paid for by a system of forfeitures. The existence of these forfeitures does not alter the essential nature of pension funds as investment vehicles heavily dependent on return from the capital markets.

There is the further fact that, contrary to the suggestions of petitioners and their *amici*, investment return has a very significant impact on the level of benefits received by participants in defined benefit plans. Actuaries compute "that for every one percent increase in return on the trust portfolio, a pension can pay out between 10 and 20 percent more in benefits." N. Levin, *Labor-Management Employee Benefit Plans*, 63 (1971).

It is, of course, possible for employers to use increases in investment yield to reduce their contributions, but the fact is that virtually all pension plans have been consistently able to raise benefits and have been able to do so largely because of their investment return. To take only one example, Local 705 points out that the "defined" benefit promised to someone working in 1950 was \$75 a month. If this same person continued to work until 1976, his or her "defined" benefit would have increased to \$425 a month. Local 705 Brief at 8-9.

For example, the investor needs to know that his or her investment may be affected by a substantial downturn. If a fund experiences severe losses and the employer maintaining the plan is unable or unwilling to increase contributions to make up for those losses, the employer always has the option of terminating the plan. See R. Pozen, *The Prudent Person and ERISA: A Legal Perspective*, FINANCIAL ANALYSTS JOURNAL, 30, 32-33 (March-April, 1977). Should the Local 705, or any other multiemployer plan terminate, the entire risk of loss would fall on the participants.<sup>9</sup> It is equally important that prospective purchasers know the non-market risks that can prevent them from receiving a return of their investment. Forfeiture provisions can effectively preclude individuals from benefitting from the market return that might otherwise be available to them.

Disclosure of risks of this nature has always been required by the securities antifraud provisions. The prospective purchaser of an investment in a pension fund is in no different a position than the individual offered stock in a company that owns a gold mine. If the offeror knows that there is no gold in the mine, the antifraud provisions require that this fact be disclosed. Disclosure is required to alert the prospective purchaser to the fact that the investment itself carries with it a risk that will make it impossible for the prospective purchaser to get a market return.

---

<sup>9</sup> In the case of terminated single employer plans, participants are likely to lose all accrued benefits if they have not worked long enough to vest. If vested, their benefits are, as a general rule, partially insured.

### C. Employees Make Investment Decisions When They Accept Offers of Employment and Ratify Collective Bargaining Agreements

While it may be true that 35 years ago workers did not make employment decisions on the basis of pension considerations, that is no longer the case. Employees today can expect a much longer life after retirement, and they are increasingly becoming aware that their social security benefits and personal savings are generally too small to support them adequately during that period.<sup>10</sup> In fact, the extent to which the employment decisions of older workers are influenced by pension benefits has become a matter of increasing concern. For example, a study prepared for the Department of Labor by the University of Maryland showed that "a promise of higher pension benefits can be more effective than higher wages in holding a worker to his employer", and concluded that the resulting diminution in labor mobility "may impair labor market efficiency and lead to loss of potential output."<sup>11</sup> As younger workers learn about the importance of pension benefits, they too are becoming concerned. This is particularly true for workers in high turnover industries such as trucking<sup>12</sup> and for many young working

<sup>10</sup> P. Shabecoff, *Life in a Rose-Covered Cottage Isn't Rosy on \$2,485 A Year*, New York Times, June 25, 1978. "In 1975, the median income of men living on Social Security was \$2,485 and of women, \$1,699." *Ibid.*

<sup>11</sup> 186 B.P.R. A-21, 22 (May 1, 1978) (summarizing "Internal and External Labor Markets: An Analysis of Manpower Utilization").

<sup>12</sup> Many over-the-road drivers find they are unable to endure the unsafe and arduous working conditions in the industry for an extended period, finding it physically impossible to keep the pace of the standard 70-hour workweek. Transferring to a city or terminal job, even within the same company, may involve transferring from one local to another and from one pension plan to another resulting in forfeiture of pension credits. Moreover, in the Chicago area, for example, there are at least 21 Teamster pension plans covering

women who know their careers may be interrupted by the responsibilities of bearing and raising children. Such workers have a strong incentive to seek jobs with short vesting requirements or liberal portability or reciprocity provisions. This cannot be accomplished, however, unless the material facts about their pension plans are disclosed to these workers at the time these decisions must be made.

Employers and unions are well aware of employees' concerns with pensions. According to authorities cited by the court below, booklets prepared by employers describing pension plans are designed "to sell the plan to employees", and pensions are second only to wages as a reason for membership rejection of contract proposals, being well ahead of such factors as vacations, hours and overtime, working conditions, and seniority. 561 F.2d at 1227 n.5 and 1244 n.41, citing D. McGill, *Fulfilling Pension Expectations* 17 (1962); Simkin, *Union Membership Rejection of Contract Settlements*, Labor Relations Yearbook 334, 342 (1967). This point could not be made more effectively than by the resounding rejections last winter by the United Mine Workers' rank-and-file of several proposed contract settlements, in large part because of dissatisfaction with their pension and related health and welfare provisions.<sup>13</sup>

truck drivers, none of which have reciprocity with the Local 705 plan. Different plans cover newspaper drivers, bakery drivers, laundry drivers, construction material drivers, grocery drivers, milk drivers, soft drink drivers, and garage attendants.

<sup>13</sup> See Franklin, *Miners Reject Pact Proposed By Leader As Disruption Grows*, New York Times, Feb. 13, 1978, at 1, col. 1 (wage offers "generally acceptable" but pension provisions "a leading source of discontent"); Robbins, *West Virginia Miners Criticize Pension Plan in Proposed Contract*, New York Times, Feb. 26, 1978, at 1, col. 4; Clarity, *Miners Reject 'Pattern-Setter' Pact by 2-1 Margin*, New York Times, Feb. 27, 1978 at 17, col. 2 (complaints about pension inequalities); Franklin, *A 3d Coal Pact Set; 'Yes' Vote Expected*, New York Times, March 15, 1978 at 1, col. 1 (health and pension benefits central reason for earlier rejection).

Without the disclosure required by the securities acts, employees will be making these most critical investment decisions in an informational vacuum, or in an atmosphere of exaggerated claims and omissions of critical facts.<sup>14</sup> Provided with complete and accurate information, on the other hand, employees would be able to take any number of actions to protect their interests in a secure retirement. For example, they could choose not to make an investment or to terminate an investment in a pension plan by declining or leaving a job or by voting against ratification of a contract. Or they could try to influence their unions and employers to provide better plans or al-

<sup>14</sup> For example, in an article appearing in *The International Teamster*, the Union's official publication sent to all members, it was stated, "Currently, the Central States Pension Plan has reciprocity agreements with more than 100 other pension plans, meaning that a worker covered under another Teamster pension plan can change jobs and transfer previously earned pension credits into the Central States Pension Plan, so that he does not lose his pension or have to begin all over again." *Like Old Man River, Central States Pension Just Keeps Rolling Along*, *The International Teamster*, Oct.-Nov. 1976, at 13. Not mentioned is the fact that of the 230 Teamster pension funds there are 160 plans that do not have reciprocity with the Central States Pension Plan. In another article, Teamster President Frank E. Fitzsimmons claimed, "The plan is fully solvent and more than able to meet its obligations through the 20th Century. . . . I also assure our membership that members of the negotiating committee for our national freight agreement intend to negotiate increased employer contributions to the plan which should further increase benefits." *Message From Frank E. Fitzsimmons*, *The International Teamster*, Feb. 1978, at 2. Mr. Fitzsimmons failed to inform his membership, however, that it would take a \$6 per person per week increase in employer contributions in the first year of the 1979 freight contract just to maintain benefits at their current levels. Central States Southeast and Southwest Areas Pension Fund, Summary Plan Description and Pension Plan, Effective Jan. 1, 1976. Negotiation of the 1979 contract has not yet even begun. If the increased employer contributions are not obtained, pensions will have to be cut by as much as \$80 per month, according to recent congressional testimony by former Central States executive director Daniel J. Shannon. H.R. Rep. No. 95-35, 95th Cong., 1st Sess. p. 143, Hearings on March 14-15, 1978, before the Subcommittee on Oversight of the House Ways and Means Committee.

ternative arrangements such as employer-sponsored Individual Retirement Accounts.

## II. DISCLOSURE UNDER THE SECURITIES LAWS IS PRACTICAL, MEANINGFUL, AND NOT UN-DULY BURDENSOME

Despite the vehement protestations of petitioners and their *amici*, there is no reason to conclude that disclosure under the securities laws would be unduly burdensome and there is every reason to conclude that it would be extremely meaningful to employees. Before considering some of the alleged problems referred to by petitioners, it is important to recognize that there have been no rulings whatsoever by either of the courts below concerning the content of disclosures that would be required by the application of the securities laws to pensions. The case comes to this Court on petitioners' Rule 12(b), F. R.Civ.P., motions to dismiss which challenged only the technical legal sufficiency of Mr. Daniel's complaint which alleged, *inter alia*, that the securities acts applied in certain limited respects to pensions. There has been no trial on the merits and no finding as to the kind of disclosures that are required by the securities laws in this unique context. It is entirely inappropriate for the petitioners and their *amici* to be seeking reversal of the decision below on the basis of purported rulings that have not yet been made.

Nonetheless, the American Academy of Actuaries seizes upon the court of appeals' *dictum*, to wit, "when offering a defined pension plan to a member [defendants must] disclose the actuarial probability . . . that a member actually receive pension benefits. . . ." (561 F.2d at 1229) as its springboard for claiming that "actuarial probabilities", as it defines the term, would be costly to determine and misleading to employees.

The issue having been raised, the Court should know that in fact the disclosure contemplated by the court below would be neither costly nor misleading. All that would be required would be disclosure of, first, the fact that there is a risk of loss, second, the factors that contribute to the risk and finally, the extent of the risk, if known.

Disclosing the risk of loss would require nothing more than that the offeror qualify his or her offer by telling prospective employees or union members that there is a chance that they will not get the offered pension.

To put the prospective purchasers on notice of the factors contributing to the risk, the offeror could allude in summary fashion to the risks inherent in defined benefit plans. These include the fact that the employees may not work long enough or continuously enough to get a right to a pension, that they may die before retirement age or that the plan might terminate.

As for the "statistically determinable risk," there is no need whatsoever for the offeror to predict the subjective likelihood of a particular individual remaining with a job long enough to qualify for pension benefits. Important and meaningful information could be provided to individuals by simply telling them about the recent experience of the plan. For example, an employer or union official might state: "During the past five years, X percent of all workers who left employment covered by this plan left without a pension benefit."<sup>15</sup> In addition, if they wished

<sup>15</sup> This same 'look back' approach was followed by the Senate Labor Subcommittee when arriving at its conclusion, referred to by the court below, that as few as 8 percent of all participants in defined benefit pension plans would receive benefits. Interim Report of Activities of Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92nd Cong., 2nd Sess., at 15, 115-153 (1972). The figure produced by this approach is, strictly speaking, not an "actuarial probability"; it is, however, a probability based on turnover and mortality data used by actuaries.

to do so, employers or unions would be perfectly free to provide additional information qualifying that disclosure so long as it were truthful. For example, an employer could say: "Many of the people who left employment here over the last five years left because of layoffs caused by the recent recession. However, we have just been awarded several large, longterm contracts and we don't anticipate many layoffs in the foreseeable future." Most employees have their own rough idea of the state of their health or of the likelihood they will seek other employment elsewhere in the future. If they are provided with information of the type suggested here, they will be able to roughly evaluate for themselves how trends within that plan apply to them, and will therefore be able to make a much more intelligent decision whether or not to invest in a particular plan.<sup>16</sup>

Providing the information outlined here to employees need not be a great burden on employers or unions. Such data is readily obtainable from employers' employment records. Indeed, estimates of the likelihood that different categories of workers will lose their benefits and the reasons for such losses are the very foundation upon

<sup>16</sup> On the other hand, a trial court, after consideration of the facts relating to a particular plan and employment relationship, might find less detailed disclosure adequate to satisfy the requirements of the securities laws as applied to pensions. For example, it might suffice for an employer to tell a prospective employee, "there are no guarantees that you'll actually get a pension and if the pension plan is important to you, you'd better check out the plan literature to see what it takes to qualify." By the same token, the disclosure requirements unions must meet at the time collective bargaining agreements are submitted for membership approval may be equally minimal. It might even be determined that unions are under no affirmative duty to disclose information concerning pension risks unless they would be materially altered by the newly negotiated agreement. However, the issue of the exact nature of the notice to be given to the employee is not before the Court at this time.

which plan actuaries calculate contribution rates and benefit levels.<sup>17</sup>

Disclosure can be made in the same manner and at the same time that the offer of the plan or the change in the plan is made. Thus, a personnel officer explaining the terms and conditions of employment to a prospective employee would mention not only the level of benefits paid to employees who qualify for their pension benefits, but also the circumstances under which benefits could be lost and the percentage of departing employees who leave without vested benefits. Similar information would be presented by a union representative when a new collective bargaining agreement establishing or modifying a pension plan is presented to the membership for ratification.

### III. DISCLOSURE UNDER THE SECURITIES LAWS DOES NOT DUPLICATE DISCLOSURE UNDER ERISA AND IS CONSISTENT WITH THAT STATUTE'S LANGUAGE AND LEGISLATIVE HISTORY

#### A. Even Under ERISA, Pensions Remain High Risk Investments

The passage of ERISA in 1974 did not eliminate the need for the type of disclosure described in the preceding section. ERISA, of course, is a major reform establishing important new standards and requirements for the creation and administration of pension plans. Nevertheless, despite the establishment of minimum participation and vesting standards and the creation of a termination in-

<sup>17</sup> This information would serve much the same purpose as the classic statement once attributed to law professors addressing first year students, "Look to the right of you. Look to the left of you. One of you will not be here next year." Such a statement does not take account of individual variables and it is only based on past experience, but it remains a good indication of the extent of the risk faced by the beginning law student. It is also far less misleading than not telling the student that there is a risk.

surance system, substantial risks remain that plan participants may never receive their pension benefits. For example, if an employee leaves covered employment before completion of the vesting period, usually ten years, he or she forfeits all contributions made to the plan on his or her behalf. Similarly, if he or she dies before reaching retirement age, all contributions may be forfeited.<sup>18</sup> Even if the employee had opted for a survivor's annuity for his or her spouse, the beneficiary usually will receive nothing if the employee dies before reaching early retirement age. If a plan terminates before an employee's interest has vested,<sup>19</sup> the employee loses all contributions made on his or her behalf, and if his or her interest has vested, he or she is insured in full only for benefits resulting from plan provisions in effect for five or more years. ERISA § 4022.<sup>20</sup>

Thus, even under ERISA, defined benefit pension plans remain a speculative, high risk investment and employees must have disclosure of the existence of risks inherent in the investment.

#### B. Disclosure Under The Securities Laws Does Not Duplicate Disclosure Under ERISA

The disclosure to employees required by the antifraud provisions of the securities acts is very different from that required by ERISA. There are critical differences with respect to who makes the disclosure, the timing

<sup>18</sup> One out of every six 45 year old males dies before reaching age 65. 1971 Group Annuity Tables.

<sup>19</sup> Over 1000 pension plans terminate each year for economic reasons. Dep't. of the Treasury, Dep't. of Labor, *Study of Pension Plan Terminations*, 1972, Final Report (Aug. 1973).

<sup>20</sup> As to benefits resulting from plan provisions added during the five years before termination, the employee is insured for only 20 percent of the benefit for each year the provision has been in effect. ERISA § 4022.

and manner in which the disclosure is made, and the content of the disclosure.

Under the securities laws, disclosure must be made by the person offering the security for sale, or that person's agent, and must be made at the time and place the offer is made. Applying these rules in the pension context, an employer offering a prospective employee an interest in a pension plan as an inducement to accept employment would have to disclose the risks associated with the plan at the time of the offer. Similarly, in the case of the sale by unions of a new or modified pension plan as part of a collective bargaining agreement, disclosure would have to be made by the union's bargaining representative at the time the agreement is offered for ratification.

Disclosure under ERISA is quite different. Under ERISA, it is the plan administrator, not the employer or the union, who is responsible for disclosure. More important, *no disclosure is made until long after the employee has accepted the offer of a pension*. Plan administrators need not furnish employees summary plan descriptions until 90 days after they become participants in the plan. ERISA section 104(b)(1). Workers over age 25 must generally wait one year before becoming plan participants and thus must wait 15 months after they have begun work and purchased an interest in a pension plan before receiving the plan description. Younger workers must wait even longer. An employee who begins work at age 17 will have to wait 8 years and 3 months before receiving information about the plan. ERISA section 202(a). Similarly, under ERISA notice of changes in plan provisions need not be furnished to employees until seven months after the end of the year in which they were adopted. ERISA section 104(b)(1)(B).

There are also important differences in the content of the disclosure required by ERISA and the securities

laws. The antifraud provisions of the securities acts require the disclosure of all material facts that a reasonable investor would consider important in making an investment decision. An investor in a pension plan would want to know not only that there is a possibility of profit but also that there is a risk of loss. Information concerning the nature of that risk, the factors contributing to it and, if known, the extent of its occurrence would have to be disclosed. Under ERISA, plan administrators only have to inform participants of the factors contributing to the risk and such information, by itself, is insufficient to alert ordinary employees to the very real existence of the risks of loss they may sustain.<sup>21</sup>

These differences in disclosure under ERISA and under the securities acts reflect the fact that these two statutory schemes are designed to serve very different pur-

<sup>21</sup> As the court below recognized:

"ERISA § 102(b) requires that summary plan descriptions include a statement of 'circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.' In theory, employees should be able to infer from this information in the plan description that there is a risk of loss, and perhaps the nature of that risk. The Department of Labor has interpreted the statutory language very narrowly, however, in proposed rules issued on June 9, 1975, 40 Fed. Reg. 24654, on which the Department has stated plan administrators may rely. 41 Fed. Reg. 16957 (April 23, 1976). Plan administrators are permitted to describe the benefits of the plan in positive language, leaving the employee to deduce the negatives implicit in the affirmative language."

561 F.2d at 1249 n.58. The final rules which were adopted by the Department of Labor on July 10, 1978, do not remedy this weakness in ERISA disclosure. 42 Fed. Reg. 37178 (July 19, 1977). Moreover, as the court below also acknowledged, most summary plan description booklets contain disclaimers of liability for incorrect information contained in the booklets, whereas waivers of liability in disclosure required by the securities laws would be ineffective. 561 F.2d at 1248 In fact, the experience of *amici* PROD, the Women's Lobby and the Institute has been that employees who have read their plan descriptions do not recognize the risks.

poses. The antifraud provisions of the securities acts are designed to protect the interest of an investor before he or she makes an investment decision, so that an enlightened decision can be made. ERISA, on the other hand, is not addressed to employees who are contemplating investing in a pension plan but rather to employees who are already on a job covered by a pension plan. The primary purpose of disclosure under ERISA is to prevent "disappointed expectations", to protect employees from losing inadvertently, through ignorance of plan limitations, pension benefits in which they might otherwise acquire an interest.<sup>22</sup> It is not designed or intended to provide information to potential plan participants before they decide whether or not to commit themselves to a specific plan. Thus the time, purpose, and content of disclosure under the securities acts is different from that under ERISA, and application of the antifraud provisions of the securities acts will in no way duplicate disclosure under ERISA.

**C. Application of the Antifraud Provisions of the Securities Laws to Pension Plans Is Consistent with the Language and Legislative History of ERISA**

The petitioners have argued in essence that application of the antifraud provisions of the securities laws to pension plans is precluded by ERISA. It is of course a fundamental principle of statutory construction that "[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature

<sup>22</sup> The ERISA disclosure provisions were primarily aimed at forestalling repetition of "horror stories" such as that of the sign painter who worked under a plan for 16 years, left, continued to pay union dues and discovered only at retirement age that he had lost his pension only because he didn't know that the plan required that he put in a minimum of one hour a year in the sign industry. As he noted "had I been aware of this rule, common sense would compel me to put in the required one hour a year to retain my pension." R. Nader and K. Blackwell, *You and Your Pension* 31 (1973).

undertook to give expression to its wishes." *United States v. American Trucking Assoc.*, 310 U.S. 534, 543 (1940). The words Congress used in ERISA clearly demonstrate that, contrary to the assertions of petitioners, ERISA was not intended to supersede the disclosure requirements of the securities laws.

Section 514 of ERISA defines the effects of the Act on other laws, and § 514(d) specifically provides that the only federal laws that are preempted by ERISA are the Welfare and Pension Plans Disclosure Act and certain provisions of Title 5 of the U.S. Code, relating to administrative procedure. Beyond those two exceptions, "nothing in this title shall be construed to alter, amend, modify, invalidate, or supersede any law of the United States . . . or any rule or regulation issued under any such law." ERISA § 514(d). From the explicit language of the statute, it is therefore plain that Congress did not contemplate that ERISA would replace remedies provided to citizens under other federal statutes.<sup>23</sup>

According to this Court in *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976), a statute should be interpreted contrary to its plain meaning only when that interpretation is supported by a clear Congressional intent expressly delineated in unambiguous legislative history. Far from offering unambiguous support for the petitioners' contention, however, ERISA's legislative history indicates that Congress never actually considered the issue of the applicability of the antifraud provisions of the securities acts. There is therefore no legislative history to support petitioners' conclusion that

<sup>23</sup> Petitioners stress that the only federal statutes intended to regulate the day-to-day relationships between pension funds and their participants and beneficiaries were ERISA, the WPPDA, the Internal Revenue Code, and the Labor Management Relations Act. The point is undeniable. However, what is not mentioned is that the present case does not involve this relationship between employees and their pension funds. Rather, it involves a security, the sale of pension funds to prospective employees by employers and in

the clear language of the statute should be ignored.<sup>24</sup> Moreover, to the extent the legislative history does provide any guidance in this area, it tends to support respondent's position that Congress was aware that the securities law could apply to pension plans.<sup>25</sup>

The absence of any more extensive discussion in ERISA's legislative history of the applicability of the antifraud provisions of the securities laws to pension

---

some circumstances by unions. It is equally undeniable that the securities acts were intended to cover transactions involving the sale of securities. Nor do the legislative histories of ERISA and the WPPDA cited by petitioners suggest that the Congress and the S.E.C. "viewed collectively bargained plans as being outside of the securities acts' milieu." Local 705 Brief at 27; *see generally* Local 705 Brief at 27-41, and I.B.T. Brief at 67-68. The "milieu" of the securities acts was simply not under consideration in any of the legislative proceedings referred to by petitioners.

<sup>24</sup> Petitioners argue that when the Congress was considering enactment of the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA), 72 Stat. 997, 29 U.S.C. § 301 *et seq.*, the S.E.C. declined to offer its services to register welfare and pension plans and accept their annual financial statements because pension plans did not fall within its province. Contrary to this contention, however, the S.E.C. was not declaring that it lacked the authority to prevent fraud in the sale to employees of pension securities by employers or unions. The S.E.C. was simply stating that it was fully occupied with the 3,000 securities it already had responsibility for overseeing and that it might be overwhelmed by any additional responsibility for the estimated 135,000 to 500,000 welfare and pension plans.

<sup>25</sup> For example, one Senate interim report noted that while the Securities and Exchange Commission did not have direct regulatory authority over private pension plans, "certain provisions of the federal securities laws which it administers do apply to such plans." S. Rep. 92-634, 92d Cong., 2d Sess. 96 (1972). In addition, former Chairman of the SEC Manuel F. Cohen categorically stated before the Senate Labor Subcommittee: "Interests in a private pension plan fall within the definition of a security under the Securities Act of 1933, and most private pension plans would be subject to regulation under the Investment Company Act of 1940 but for a specific exemption from that statute." Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 3598, 92d Cong., 2d Sess. 231 (June 21, 1972).

plans is easily explained. The problems Congress sought to alleviate with ERISA were the problems of employees who had worked for long periods for one employer or in one industry with the expectation of receiving a pension upon retirement. ERISA was not aimed at the problems of workers who were contemplating initial investments in pension plans or who were trying to evaluate proposed changes in their pension plans. The debate over ERISA focussed on the costs of imposing minimum participation, vesting, and funding standards and of establishing a pension insurance system. The disclosure provisions were the one area of ERISA upon which there was general agreement, and they were not debated at length.<sup>26</sup>

Congress was well aware that ERISA is only a partial solution to the problems in the pension field, and there is no support in the legislative history for a conclusion that the Act was intended to preclude all other remedies and causes of action relating to pensions. As Congressman Carl Perkins, Chairman of the House Education and Labor Committee, described the House version of ERISA:

"[It is] a modest bill. It does not purport to solve every problem. . . . We do hope that we have provided relief for the worst inequities. Basically our effort is designed to protect the long service em-

---

<sup>26</sup> A more practical explanation why the securities acts were not discussed in ERISA's legislative history may be that until very late in the development of the statute, pension issues were entirely in the hands of the labor committees of the House and Senate, which vigorously sought to preserve their exclusive jurisdiction and apparently resisted the claims of jurisdiction by other committees. Along these lines, it has been suggested by one observer that one reason organized labor and the pension industry have so strongly objected to the lower court's characterization of pensions as securities is that "The SEC is an effective law enforcement agency where the unions and the companies don't have an 'in'". Kramer, *Fight On Over Protecting Pension Fund Investors*, The Washington Post, May 25, 1978, at D-12, 17, col. 3.

ployee participating in and contributing to a pension plan who would otherwise lose it . . . ."

Legislative History of ERISA at 3369 (G.P.O. 1976).

The relationship between the remedies provided in ERISA and the remedies concerning pensions provided in the securities act is quite analogous to the relationship between the Civil Rights Act of 1968 and 42 U.S.C. § 1982, the Civil Rights Act of 1866. That relationship was discussed by this Court in *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968), which held for the first time that § 1982 provided a remedy for housing discrimination in the private sector. The court ruled that the passage of the 1968 Act, which also provided a remedy for housing discrimination, did not preempt the older law. "The Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute." 392 U.S. at 416 n.20. The Court took this position despite "the fact that [§ 1982] lay partially dormant for many years." It held that "ingenious analytical instruments" could not be used to limit the application of § 1982 "even though its application to . . . the present context is without established precedent." *Id.* at 437.

The analysis offered by the Court in *Jones* is also applicable here. The present case may constitute the first occasion for a court to apply the disclosure requirements of the securities acts to the pension area, but short of a stronger indication of Congressional intent to the contrary, the mere fact that this remedy has previously lain dormant and that similar, but not identical, disclosure is required under a more recent statute do not warrant a conclusion that application of the securities acts to pensions has been precluded by ERISA.

#### IV. THE DECISION BELOW DOES NOT CONFLICT WITH NATIONAL LABOR POLICY AND DOES NOT THREATEN INTERFERENCE WITH COLLECTIVE BARGAINING

Petitioners Local 705 and Louis Peick, and ERIC as *amicus curiae*, argue that the decision below conflicts with principles of federal labor law and threatens to disrupt the collective bargaining process. They contend that application of the antifraud provisions of the securities laws to union negotiated pension plans will undermine the principle that the union is the exclusive bargaining agent for its members and will cause employers to intrude upon internal union proceedings. None of these arguments can withstand close scrutiny.

The decision below does not require unions to submit collective bargaining agreements establishing or modifying pension plans to their members for ratification. It merely states that when such votes are conducted, the unions sponsoring them cannot intentionally misrepresent the provisions of the plan or omit material facts relating to the plans when they describe the plans, or plan modifications, to their members. The assertion that this holding "abrogate[s] the principle of *collective bargaining* . . . [and gives] the individual employee . . . unfettered authority over a mandatory subject for bargaining"<sup>27</sup> is a gross distortion. It is still the union alone that has the authority to initiate collective bargaining and to negotiate with management. No one, least of all the court below, is suggesting that individual union members now have the right to negotiate their own terms for their pension coverage.<sup>28</sup>

<sup>27</sup> Local 705 Brief at 51 (emphasis in original).

<sup>28</sup> ERIC's fear that the decision below will require employers to attend ratification meetings and deal individually with employees and thereby override the union as the exclusive bargaining representative is without foundation. ERIC Brief at 42-44. Contract rati-

A union's exclusive right to bargain, however, does not always include the authority to bind the union's members to the agreement negotiated. Where a union constitution requires a vote of the membership to ratify a new collective bargaining agreement,<sup>29</sup> no agreement reached between the union and management becomes binding until it is voted upon and approved by the membership.<sup>30</sup> A proposed contract may be rejected by the

fication procedures are followed only by those unions which have made an intra-union, constitutional commitment to their members to offer them the contract proposals negotiated by the union for their approval. Hence, it is the union, not the employer, which must report to the employees and make representations concerning the proposed agreement and which must accordingly disclose material facts concerning the effects the agreement would have upon their pension plan. No employer would be liable for a union's misrepresentation or omission of a material fact in describing to its members the pension provisions or plan modifications unless that employer consciously aided and abetted in the violation, with the required showing of scienter. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). Thus, while the decision below neither requires nor authorizes employers to attend union ratification meetings or to approve union contract literature sent with ballots, labor law does not forbid employers, contrary to ERIC's suggestion (Brief at 42), from communicating directly with their employees, in a non-coercive manner, about contract negotiations and proposed settlements. See e.g., *NLRB v. Movie Star, Inc.*, 361 F.2d 346, 349 (5th Cir. 1966); *Stokely-Van Camp, Inc.*, 186 NLRB No. 64, 76 LRRM 1166 (1970).

<sup>29</sup> Article XVI, section 4(a) of the Constitution of petitioner International Brotherhood of Teamsters, for example, provides in part: "Upon completion of [contract] negotiations . . . such contract shall be submitted to the membership covered by said *contract proposal* for their approval or rejection. If a majority of the votes cast by Local Union members voting approve such contract, it shall become binding and effective upon all Local Unions involved and their members." (emphasis added).

<sup>30</sup> The cases cited in the ERIC Brief at 42 n.29 do not weaken this point. Those cases involved union attempts to abrogate newly negotiated agreements though they had the authority to execute contracts, and had done so, without membership approval. Hence, they do not stand for the proposition that those unions which do not possess such authority, and do not represent to employers that they

membership for any number of reasons, including dissatisfaction with its pension provisions. Rejection does not mean the union is no longer the exclusive bargaining agent for its members; it simply means the union must reopen negotiations and seek an agreement more in line with its members' wishes.<sup>31</sup> These policies and practices are in no way affected by the decision below, except to the extent the membership is better informed on the issues on which it is voting.<sup>32</sup>

are vested with such authority, may be required to execute agreements regardless of membership approval. In any case, Article XVI, section 4(b) of the Teamster constitution requires that "all employers negotiating contracts with [the various union conferences, divisions, committees or subordinate bodies] shall be provided with a copy of this Article at the time negotiations are started so they will have notice of the approval necessary for a binding contract."

<sup>31</sup> Nor will application of the securities laws to pensions disrupt the bargaining process. As explained in Argument II, *supra*, disclosure would not be unduly burdensome and need not delay the negotiation and ratification of agreements. Furthermore, many union constitutions, including that of the petitioner International Brotherhood of Teamsters, have procedures whereby striking members can be ordered back to work after contract negotiations have concluded but prior to actual ratification. Article XVI, Section 4(b). Any delay in ratification resulting from evaluation of pension plan modifications and preparation of disclosure materials would therefore not disrupt either the bargaining process or induce union members to engage in longer strikes.

<sup>32</sup> Local 705's position on this point gives the Court a glimpse of its unhealthy attitude towards the principles of union democracy. The union is willing to create the appearance of union democracy by permitting ratification votes in which the members voting are kept in the dark about key issues, but as soon as the possibility of meaningful disclosure on some of those issues was made real by the court's decision below, the union sounded the false alarm that national labor policy is threatened.

According to columnist Mike LaVelle of the Chicago Tribune, "Even more threatening to corrupt labor unions than federal agents going through financial records are rank and file members pushing democratic changes from below." LaVelle, *Teamsters to Vote on a Gag Rule*, Chicago Tribune, May 18, 1978. In a recent effort to further reduce union democracy in Local 705, petitioner Louis Peick

ERIC's suggestion that other remedies are available under the labor laws that could sufficiently protect union members' interests in their pension plans without application of the antifraud provisions of the securities acts, ERIC Brief at 43 n.30, is also in error. As long as complete and accurate disclosure of the terms of a pension plan is not required at the time they have to make investment decisions, union members may not realize until it is too late that they have been misled or only partially informed concerning their pension rights. Voting out the officers of the union and replacing them with new ones at that point is small compensation for the loss of a pension.<sup>33</sup> Finally, it cannot be argued that union members are protected from abuse by the generalized "duty of fair representation." Under that doctrine, a union owes its members little more than an affirmative obligation to refrain from treating any of them in a discriminatory or hostile way, *Vaca v. Sipes*, 386 U.S. 171 (1967), and the doctrine offers union members only the most limited protection. See Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. Pa. L. Rev. 251 (1977).

recently proposed new bylaws which "would allow the local to loan union funds with no collateral or interest and without membership approval; . . . set union salaries and expenses [sic] accounts without membership approval; appoint all union stewards, committee members, health, welfare and pension fund trustees, and all but four business agents without membership approval." *Id.* The proposed bylaws would also give the union's executive board the power to arbitrarily ban from membership meetings or remove from membership meetings any member whose presence might cause a disruption. "As one teamster member said, 'If you file a grievance and you want to complain about it at your next union meeting the executive board can simply bar you from the meeting. That sounds like Russia to me.'" *Id.*

<sup>33</sup> Under the Teamster constitution, members are given the right to elect only their local union officers and cannot effectively remove those higher ranking officials who negotiate area or industry agreements.

Accordingly, the decision below would not upset the union's role as an exclusive bargaining agent and would provide employees with vital protections not afforded by the labor laws.

#### V. PETITIONERS' PREDICTIONS OF CATASTROPHIC LIABILITY ARE TOTALLY UNFOUNDED

Petitioners and their *amici* make exaggerated and alarming predictions that retroactive affirmance of the circuit court's opinion will doom the Local 705 Pension Fund, the entire pension industry and possibly strike a near fatal blow to the national economy. These claims are unfounded and are made to the Court with the hope of distracting it from the more concrete legal issues presented by this case. Were there any basis for these claims, *amici* PROD, Women's Lobby and the Institute, who represent the interests of active workers whose pension investments would allegedly be jeopardized, would be among the first to protest.

In the first place, the district court has only held that Mr. Daniel's complaint states a cause of action under the securities acts. The court has not yet had occasion to define what the measure of damages would be in the event Mr. Daniel should prevail. Therefore, it is premature at this early stage of the litigation to speculate about the extent of liability either to the Local 705 Pension Fund, or to the pension industry. Until the nature of the securities' disclosure obligations of unions and employers can be refined, such speculation will at best be of little value, and at worst, be misleading. Only thereafter can the measure of damages be defined.

Nonetheless, petitioners and their *amici* seize this opportunity to engage in doomsaying in the hopes of distorting this Court's judgment concerning the legal ruling below. If potential liability is to be the tail that wags the legal dog, it might be wise for this Court to defer ruling until the scanty record now before it can be

developed more fully and the alarmist predictions made by petitioners and their *amici* can be tested by the adversarial process.

The dire consequences forecast by petitioners and their *amici* are founded on the results of the Hansen and Grubbs studies.<sup>34</sup> The enormous liabilities projected by those studies arise only after acceptance of certain fundamental premises such as an exceedingly lenient statute of limitations, a complete failure by the courts to balance the equities when awarding relief, and an assumption that all past and present participants would be able to demonstrate injuries arising from their reliance upon misrepresentations or omissions of material facts. The Grubbs study totally ignored the scienter requirement of *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and, in effect, estimated the liability that would result if the vesting and break-in-service provision of *ERISA* were made retroactive, *not* the liability if the antifraud provision of the *securities laws* were applied to pensions retroactively. The Grubbs study—prepared, incidently, by an actuary, not a lawyer—implicitly recognized this fact when it stated:

“Most terminated non-vested participants have not been led to expect that they were entitled to a pension. If liability exists only with respect to terminated participants who received information leading them to expect a pension, it does not apply to most terminated participants. In such a case, the potential liability would be a *very small fraction* of the amounts shown in Section III.”

Grubbs, *supra*, at II-3 (emphasis added).

<sup>34</sup> D. Grubbs, *Report to the Secretary of Labor: Potential Effects of Daniel*, March 20, 1978 (prepared under Contract J-9-P-7-0064) (hereinafter cited as Grubbs); untitled study by A. S. Hansen, Inc. of potential effects of *Daniel* on Local 705 (Local 705 Brief at A1-A31).

Petitioners and their *amici* rely on the Grubbs and Hansen studies to urge this Court to follow *Los Angeles Department of Water & Power v. Manhart*, — U.S. —, 98 S.Ct. 1370 (1978), and make any ruling which might affirm the Seventh Circuit's decision purely prospective in effect. What they fail to point out, however, is that unlike the defendants in *Manhart* who were “conscientious and intelligent administrators of pension funds,” 98 S.Ct. at 1381, the petitioners in this case may not have clean hands. If Mr. Daniel wins his case on the merits, he will have shown that the petitioners committed an *intentional fraud*.

Rather than making its ruling completely retroactive or completely prospective, the Court could reasonably strike a middle ground by making its ruling prospective for active and future employees, such as those represented by *amici* PROD, Women's Lobby and the Institute, and at the same time granting relief to Mr. Daniel and members of his class, those Local 705 members who can prove that they were defrauded.

Even if liability imposed upon petitioners were to be substantial—which is unlikely—the result would not be the collapse of the Local 705 pension fund. One of the advantages of defined benefit plans is that *ERISA* funding standards permit unfunded plan liabilities to be carried forward. Thus *ERISA* section 302 provides that unfunded past service liabilities may be amortized over a 40 year period. In addition, under section 303, the Secretary of Labor has the authority to waive minimum funding standards where at least 10 percent of the employers contributing to a plan would suffer substantial hardship. Section 304 permits the Secretary to extend the amortization schedules if there is a threat to the continued existence of a pension plan. Thus, the effects of liability on the plan could be spread over 40 years, with only limited negative impact at any one time.

At worst, the overall result for current and future members of Local 705 might be that increases in benefits would be delayed for a period of time. This would, however, be more equitable than to require retirees such as Mr. Daniel who worked long years in reasonable reliance upon material misrepresentations of fact to forfeit their hard-earned pensions.

There are also strong policy reasons for making this decision both prospective and retroactive against petitioners. As this Court has frequently acknowledged in its decisions prospectively overruling long-established judicial precedent, "Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual." *Simpson v. Union Oil Co. of Calif.*, 396 U.S. 13, 14 (1969). See also *Stovall v. Denno*, 388 U.S. 293, 301 (1967). While that rule has not been followed without exception, see, e.g., *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), it is based in part on the importance of providing litigants with an incentive for seeking necessary changes in long-established principles of law. See *Stovall v. Denno*, *supra*, 388 U.S. at 301. As one respected commentator has observed:

"The effective operation of the regular judicial process depends upon parties raising issues for decision and presenting (ordinarily through adversary argument) the consideration relevant to the wise resolution of those issues. The performance of these functions by litigants depends, not unnaturally, upon the incentive supplied by the possibility of winning a rewarding judgment. When a new rule of law is given purely prospective effect, it of course does not determine the judgment awarded in the case in which it is announced. It follows that if parties anticipate such a prospective limitation, they will have no stim-

ulus to argue for change in the law. Indeed, the recognition of even a substantial possibility of such limitation will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases. Under such circumstances, issues involving renovation of unsound or outmoded legal doctrines will either not be presented for judicial decision or—what may be even more troublesome—if reached by the courts, may be decided upon inadequate argument and consideration."

Mishkin, *The Supreme Court 1964 Term—Forward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965).

## CONCLUSION

For the foregoing reasons, PROD, Women's Lobby Inc. and the Institute urge this Court to affirm the judgment of the court below.

Respectfully submitted,

MICHAEL J. GOLDBERG  
ARDITI, SALAZAR & GOLDBERG  
1812 East Madison Street  
Seattle, Washington 98122

ARTHUR L. FOX II  
2000 P Street, N.W.  
Washington, D.C. 20036

*Of Counsel:*

DOUGLAS L. PARKER  
600 New Jersey Ave., N.W.  
Washington, D.C. 20001

*Attorneys for Amici Curiae PROD,  
Women's Lobby, Inc. and the  
Institute for Public Interest  
Representation*